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*Chairman*: Mr. Mochochoko ..... (Lesotho)

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Agenda item 155: Report of the International Law Commission on the work of its fifty-first session *(continued)*

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*The meeting was called to order at 10.15 a.m.*

**Agenda item 155: report of the International Law Commission on the work of its fifty-first session** (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Hilger** (Germany) welcomed the provisional adoption by the Drafting Committee of a set of draft articles on State responsibility (A/54/10, paras. 49-453). In Part One, chapter III of that text, the replacement of the former 11 articles by five new draft articles was to be commended, since the former chapter III had seemed somewhat overregulated. The reformulation of draft article 16, the new key provision of the chapter, was a great improvement: it covered the content of former article 17, paragraph 1, and article 19, paragraph 1, which could therefore be deleted without any loss of substance. The same was true for articles 20, 21 and 23 of the 1996 draft. His delegation also agreed with the changes to draft article 18, with its general rule on the time factor in relation to breaches of international law. The special rules for continuing and composite acts should be incorporated in draft articles 24 and 25.

2. With regard to draft article 25, the definition of composite and complex acts raised the issue of whether the Commission should adhere to a narrow concept only in the case of the former. His Government had not yet made a final decision on the matter. The decision by the International Court of Justice in the *Case concerning the Gabcikovo-Nagymaros Project* would obviously have a significant impact on the discussion of composite acts.

3. With regard to chapter IV of the draft articles, he welcomed the incorporation of exact criteria for the circumstances under which a State aiding in the commission of an internationally wrongful act was internationally responsible. The savings clause — draft article 28 *bis* — ought to cover all the cases envisaged in chapter IV. The provisions of the chapter should not preclude any other basis for responsibility of a State that assisted, directed and controlled or coerced another State.

4. Chapter V had been the most difficult chapter of the draft to deal with during the Commission's latest session, since as provisionally adopted on first reading it had been extensively referred to in judicial decisions and in the literature. Further changes therefore deserved particularly careful consideration. His delegation was not convinced that draft article 29 should be deleted, even after hearing the argument that consent by another State did not preclude wrongfulness; a provision on consent should be retained in the text.

5. His delegation was also interested in two other issues relating to the preclusion of wrongfulness: *jus cogens* and self-defence. It would welcome an article recognizing the predominance of peremptory norms as well as further discussion on the question. A second paragraph in draft article 29 *ter* as proposed by the Special Rapporteur concerning self-defence and the obligations constraining States would be useful. The problem had been dealt with by the International Court of Justice in its Advisory Opinion on the Legality of the *Threat or Use of Nuclear Weapons*. An explicit paragraph would be preferable to a mere elaboration in the commentary.

6. Draft article 31 was another important provision in chapter V. There was no general requirement in international law that a State must know that its conduct was not in conformity with an obligation. His delegation therefore agreed with the proposed deletion of the subjective requirement of knowledge of wrongfulness. The deletion of other aspects of the provision was, however, acceptable only if the commentary made it sufficiently clear that *force majeure* must be genuinely beyond the control of the State invoking it and did not apply to situations in which a State brought the *force majeure* upon itself, either directly or by negligence.

7. The provision of draft article 33 on necessity was difficult and problematic. It should be possible to invoke necessity as grounds for precluding wrongfulness only in extreme cases. The draft article should therefore be drafted in the negative. As to whether the problem of humanitarian intervention should be discussed in the framework of necessity as defined by the draft article, the Commission had probably been wise to let the matter be solved in the light of developments within the United Nations system.

8. **Mr. Sepulveda** (Mexico) expressed the hope that the progress made on the draft articles on State responsibility would lead to their adoption on second reading. Significant changes had been made to their content and structure, some of which had been necessary for the sake of clarity, while others had been introduced in the interest of the widest possible acceptance. A balance had to be struck, however, for excessive simplification could weaken the effect of the Commission's work.

9. The Special Rapporteur's second report on State responsibility (A/CN.4/498 and Add.1 and 2) contained amendments that would render the draft articles substantially different from the text approved on first reading in 1996. It was therefore not yet possible to gain an overall picture of the draft articles, nor could an opinion on individual provisions be assessed if their scope had not yet been

determined. For example, one might ask how the legitimacy of countermeasures was to be judged if the dispute settlement system in relation to State responsibility was not yet known, or whether such a system would be valid even if the draft articles did not take the form of a convention.

10. Draft article 16 was crucial and its inclusion was therefore essential. The source of the obligation — whether customary, conventional or other — was, however, irrelevant to the effects of the responsibility; it would therefore be wrong to set up a system linking the existence of responsibility with the source of the rule that had been breached, even if that source had an effect on the specific consequences of the responsibility. More importantly, even when it was not a determining factor, the magnitude of the responsibility, which affected such issues as reparation or compensation, depended on the kind of rule transgressed. The breaching of a peremptory norm, such as the prohibition of the use of force in international relations, had a far more serious effect, nature and scope than the breach of a contractual rule between two States.

11. More attention should be paid to the crucial issue of the relationship between wrongfulness and responsibility, which was relevant in establishing the link between chapters III and IV. In many cases, a State which breached an international obligation could be excluded from responsibility if there were extenuating circumstances, but the breach remained a wrongful act. The Special Rapporteur's suggestion of combining the concepts contained in article 16, article 17, paragraph 1, and article 19, paragraph 1, in a single text might resolve some of the confusion that had arisen and therefore merited serious consideration.

12. With regard to draft article 18, one of the basic requirements for the existence of international responsibility was that the obligation that had been breached should be in force in the transgressor State. As the principle of intertemporality applied equally to all international obligations, there could be no exceptions to draft article 18, paragraph 1. It was important that that principle should be clearly reflected in the draft, on the basis of the modes of interpretation recognized in the Vienna Convention on the Law of Treaties. His delegation also endorsed the Special Rapporteur's suggestion that a new article should establish the principle that, once the responsibility of a State was engaged, it did not lapse merely because the underlying obligation had terminated.

13. With regard to the proposed text of article 20, his delegation believed that, for the time being, the distinction between obligations of conduct and obligations of result should be retained, since it helped to determine when a breach occurred and when it was completed. Its elimination would, admittedly, not substantially affect the rules on State responsibility as a whole, but the distinction was worth preserving in case it should prove useful in other chapters.

14. It had been wise to strengthen draft article 26 *bis*, a procedural provision that was actually substantive, defining the moment at which State responsibility could be invoked. Non-compliance with the provision affected the very existence of responsibility, since the exhaustion of local remedies could determine whether or not international responsibility existed by giving the State an opportunity to correct its wrongful conduct.

15. Concerning chapter IV of the draft articles, his delegation shared the Special Rapporteur's view that the nature of a State's responsibility for the acts of another State should be considered from a broad perspective which took into account the concepts of *jus cogens* and *erga omnes*. Responsibility existed only when the conduct of a State involved the breach of an international rule that required it to act in a specific way. It had long been accepted that a State could bear responsibility for the wrongful act of another State when assisting, directing or controlling the commission of an internationally wrongful act or coercing it. Such responsibility would, however, depend on the obligations under international law of the State that urged on the other State.

16. The suggestion that draft article 29, on consent, ought to be deleted should be regarded with caution. Consent given in advance of an act created a circumstance that precluded wrongfulness. That was why a system of rules should be established. A more detailed analysis was required, however. Deleting the provision would not simplify the draft articles or avoid the need to define the conditions under which consent precluded wrongfulness. The draft article should be rewritten to reflect that.

17. With regard to draft article 29 *bis*, on compliance with a peremptory norm, he said that there were very few circumstances in which the provision would apply in practice, so that its inclusion in the draft articles was questionable, and probably unnecessary.

18. The text of draft article 29 *ter* suggested by the Special Rapporteur gave rise to some doubts. Any provision relating to self-defence in the draft articles must conform with those of the Charter of the United Nations. Paragraph 2 of that article posed further difficulties by placing limitations on an inherent right.

19. It would be best to retain draft articles 30 and 30 *bis* in square brackets until the regime of countermeasures was defined in chapter III of part two. If the latter was to be retained, the causal link between prior non-compliance and subsequent non-compliance should be strengthened. Some reference should also be made to proportionality.

20. The inclusion of draft article 33 might unnecessarily complicate the draft articles. The concept of necessity should be included in the draft articles, but only under well-defined conditions and within strict limitations. The draft text was not the right place to include concepts not completely rooted in international law, such as humanitarian intervention. The provisions on the use of force set out in the Charter were peremptory norms, and necessity could not be invoked to justify their violation.

21. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he offered some comments on paragraphs 604-608 of the Commission's report (A/54/10). The differences within the Commission on how to deal with the topic had led some members to question the need to pursue the work any further, with the result that the Commission had gotten bogged down in procedural matters. The question of preventing hazardous activities, useful though it was, was not the principal part of the Commission's mandate, while discussions on liability itself had not produced enough substance for the Sixth Committee to adopt firm decisions on that aspect of the topic.

22. Under international law, States were obligated to ensure that their activities did not cause transboundary harm. Principle 22 of the Stockholm Declaration clearly stated that States should cooperate in developing international law on liability and compensation for the victims of pollution or any other environmental damage caused by activities under its jurisdiction or control in areas beyond its borders. It was thus clear that a far more complete and coherent regime of liability was required than currently existed in international law. State practice with regard to hazardous activities showed that the concept of liability for transboundary damage was becoming increasingly established. It was therefore hard to understand the Commission's reluctance to address the topic.

23. It was particularly regrettable that, despite appeals to the contrary, the Commission had decided to suspend its consideration of liability until the draft articles establishing a prevention regime were adopted on second reading. His delegation supported that decision reluctantly; it would have preferred to continue the analysis, taking into account the work of previous Special Rapporteurs. Both the need to continue considering the question of liability and the unprejudicial nature of the suspension of work should be reflected in any resolution adopted by the General Assembly on the Commission's report.

24. Although protection of the environment was a complex and broad question, the Commission's request for specific questions for study in that area (A/54/10, para. 33) had sparked his delegation's interest. The Commission should carry out a preliminary study of specific environmental issues to help States decide whether to proceed with codification and development in that area. In-depth studies might be conducted later on, *inter alia*, the "polluter pays" principle and *erga omnes* obligations with regard to the environment, based on State practice. In future sessions, the Commission might prepare concrete feasibility studies for submission to States, identifying the questions it wished to address, the approach to be taken and anticipated results.

25. With regard to the holding of split sessions (paras. 633-639), his delegation believed that the Commission would benefit from dialogue and interaction with the Sixth Committee in New York. However, it would be premature to decide to hold split sessions permanently in view of their financial implications and the practical disadvantages of travelling back and forth between New York and Geneva. Greater productivity, perhaps a revision of the Commission's programme of work, should form the basis for any decisions taken.

26. **Ms. Hallum** (New Zealand) said that the codification of State responsibility was closely related to the purposes and principles of the Charter of the United Nations. As the Commission entered the final phase of its work, it was essential to maintain the momentum that had produced a set of draft articles of broad application and appeal. She urged States to assist the Commission in completing its work on the topic by 2002.

27. Among the difficult issues that remained to be resolved was the eventual form the draft articles should take. Other more fundamental issues requiring attention were the distinction between the criminal and the delictual responsibility of States; the problem of conflicting international obligations; the desirability of categorizing obligations and breaches; a satisfactory regime for the attribution to States of responsibility for internationally wrongful acts; the boundaries and content of the chapter of the draft articles dealing with circumstances precluding wrongfulness and the extent to which articles in that chapter dealt with primary rather than secondary rules; the application of countermeasures by an injured State; and the question of dispute settlement.

28. The relationship between the various chapters of the draft articles had yet to be satisfactorily articulated. The relationship between chapters II and III was clearly set out in draft article 3. How chapters IV and V fit in was less clear, but they might be considered to fall under the second part of draft article 3 concerning breach of an international obligation. Her delegation supported the streamlining of chapter III, provided that clarity and comprehensiveness were retained; the draft articles should not be over-simplified.

29. The distinction between obligations of result, obligations of conduct and obligations of prevention was a valuable one in analytical terms. Her delegation would support any pragmatic approach to retaining the distinction in the draft articles and commentary. Draft articles 24 and 25 on completed and continuing wrongful acts should be simplified, but the distinction should be preserved, since a completed wrongful act was qualitatively different from a continuing one and might involve different consequences.

30. On preliminary consideration, chapter IV might well be extended to cover interference with contractual rights, but the regime created must be universally acceptable and must not impinge inappropriately on the realm of primary rules. Her delegation also felt that a draft article 34 *bis*, setting out a procedure for invoking a circumstance precluding wrongfulness, might be a useful addition to the draft articles.

31. **Mr. Rao** (India) said that, in order to complete the draft articles on State responsibility and ensure their adoption on second reading by the year 2001, the Commission should retain well-established principles embodied in the draft articles and make only sparing drafting and structural changes; sacrifice progressive development wherever possible; eliminate concepts on which consensus had not been achieved or which were controversial; and ensure a clear relationship between different parts of the draft articles, which had been developed at different times by different Special Rapporteurs. He called for flexibility in establishing the final form of the draft articles, which were secondary rules and could not affect the primary rules or obligations contained in international conventions or arising from customary international law. Essentially, the draft articles would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade that had been developed in recent years.

32. The international community had no satisfactory and commonly accepted forums or methods for determining wrongfulness of conduct. Furthermore, the primary rules on the non-use of force, self-defence or *jus cogens* or *erga omnes* obligations, international humanitarian law or even human rights did not lend themselves easily to universal interpretation and application. Responsibility could vary according to conditions and circumstances in different parts of the world. Differentiated responsibility was therefore essential. Since the law of State responsibility could not have greater clarity than the primary rules or be more rigorous than the primary obligations, excessive elaboration of the concept of State responsibility in the draft articles would be counter-productive.

33. It was to be hoped that a precise set of draft articles under Part One would be available with appropriate commentary the following year. The Commission should simplify the content and presentation of the draft articles and, perhaps, deal separately with the important concept of international crimes. His delegation would appreciate clarification and simplification of such concepts as "complex acts", "fortuitous events", "obligations of conduct" and "obligations of result" as opposed to "obligations of prevention". As a working hypothesis, it would be useful to maintain the distinction between obligations of conduct and obligations of result. The concept of wrongfulness should also be treated separately from circumstances precluding wrongfulness, including consent, *force majeure*, distress, state of necessity and self-defence; those factors should exonerate a State from the consequences of wrongful conduct but not from the attribution of responsibility itself. Since those concepts were often virtually indistinguishable, their presentation should be consolidated in order to avoid confusion. The concept of self-defence precluding the consequences of wrongfulness was different from the concept of self-defence described in Article 51 of the Charter of the United Nations. Moreover, the role of consent as a circumstance precluding consequences was ambiguous, particularly in cases where the breach of an international obligation was of concern to more States than the one which had been directly injured and might have given its consent.

34. His delegation was not convinced that the law of State responsibility should deal with the complicated and largely abused concept of countermeasures, which were wrongful in themselves. It reserved its position on the need to treat countermeasures as a circumstance precluding wrongfulness under chapter V in Part One. The subject should not be treated further under Part Two.

35. With respect to the questions raised in paragraph 29 of the Commission's report, he said that a distinction should be drawn between States which were directly injured and those which had only a legal interest in the performance of obligations under treaties or customary international law. Intervention by the latter category of States in any situation of wrongful conduct should be governed by limits of

appropriate *locus standi*; only the State which had actually suffered material damage should be entitled to seek compensation. His delegation wished to reserve its position on the suitability of incorporating the complicated concept of differently injured States in the draft articles. In general, payment of interest on overdue compensation should be determined only after the amount of compensation had been fixed and a sufficient grace period for its payment had been allowed.

36. **Mr. Baena Soares** (Brazil) stressed the need to achieve progress in elaborating a draft convention on jurisdictional immunities of States and their property, an urgent question which continued to be deferred. The erosion of the practice of *par in parum non habet judicium* was practically universal; still, the lack of a binding text to deal with the differing treatment of the question by different States must be addressed.

37. An international convention on jurisdictional immunities of States and their property must take into account rapidly changing realities. In Brazil, for example, the Federal Court had ruled that customary norms of absolute immunity did not apply to labour-related cases, where defendants commonly claimed immunity from jurisdiction. Controversial aspects of the draft convention should be negotiated in the open-ended Working Group of the Sixth Committee to consider outstanding substantive issues. The Working Group should focus on the five substantive issues highlighted by the Chairman of the International Law Commission and should not reopen discussion of questions on which consensus had been achieved.

38. The Working Group's suggestion to redraft paragraph 1(b) of article 2 on the concept of State for purpose of immunity was acceptable, although it would be preferable to delete the brackets. Concerning the determination of the commercial nature of a contract or transaction, his delegation believed that the nature of the act should be retained as a criterion. With regard to the question that had arisen in relation to article 10, his delegation supported the suggestion to clarify paragraph 3 by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State, as suggested by the Working Group. The question of contracts of employment merited further consideration, although his delegation accepted the Working Group's proposed exceptions to the general principle of article 11.

39. With regard to measures of constraint against State property, his delegation agreed with the distinction made by the Working Group and hoped that its debates would elicit new elements that would lead to the selection of one of the three alternatives presented (A/54/10, annex, para. 129).

40. It was to be hoped that the draft articles on State responsibility would be completed and adopted on second reading by 2001 and his delegation supported the proposals put forward by the representative of India to that end. The tremendous effort invested by the Commission in the topic must necessarily culminate in a convention that was clear and could be implemented in practice. On the key question of the definition of an injured State, his delegation supported the distinction drawn between a State or States specifically injured by an internationally wrongful act, and other States which had a legal interest in the performance of the relevant obligations. It also hoped that the question of countermeasures would be given precise treatment, and that their limits and the exceptional nature of their application would be defined.

41. **Mr. Blumenthal** (Australia) speaking on State responsibility, said that his delegation had some concerns regarding the definition of an "injured State" in the context of multilateral treaties. Article 40, paragraph 2(e)(iii), of the draft articles on that topic appeared to allow any State party to a multilateral treaty for the protection of human rights and fundamental freedoms to be considered an injured State and therefore to seek reparation. While acknowledging the special position of human rights treaties, his delegation wondered what form the reparation to other States parties might take when a State party to a human rights treaty had violated the rights of its own citizens in breach of its international obligations, and how the reparation might be assessed if no actual injury had been suffered by those other States parties. If reparation in such cases was not limited to assurances and guarantees of non-repetition, the provision might encourage States to seek the other forms of reparation listed in article 42.

42. The reference in article 40, paragraph 2(f), to treaties for the protection of the collective interests of the States parties thereto required clarification as to the kind of multilateral treaties covered and raised the same questions regarding reparations. Lastly, under article 40, paragraph 3, if an internationally wrongful act constituted an international crime, the definition of injured State embraced all States, not only those whose rights had been infringed by the criminal act. His delegation doubted whether it was sensible or even workable to allow all States to seek reparation for damage perpetrated by a State against the human beings within its jurisdiction.

43. It had long been established in international law that full reparation was required without qualification. His

delegation was unaware of any State practice, international rule or legal decision supporting the exception stated in paragraph 3 of article 42 whereby reparation need not be paid if it would result in depriving the population of a State of its own means of subsistence. That exception could be abused by States to avoid their legal obligations. Nor could his delegation agree to the exception provided in article 43, paragraph (d), on the grounds that reparation would seriously jeopardize the political independence or economic stability of the State which had committed the internationally wrongful act.

44. In article 44, paragraph 2, the words "may include interests" should be replaced by the phrase "shall include interests" so as not to give the wrongdoing State an incentive to delay payment of compensation. Obligatory payment of interest would be consistent with the views of international tribunals that had considered the matter.

45. In article 45 it would be useful to define the expression "moral damage" appearing in paragraph 1. Paragraph 2(c) referred to punitive damages, a practice not recognized in all jurisdictions. The provision of paragraph 2(d) concerning disciplinary action against officials was a domestic concern which should not be covered by the draft articles. Given cultural differences, the provision of paragraph 3 limiting the satisfaction available to demands which would not impair the dignity of a wrongdoing State was arbitrary and should be deleted.

46. The Commission's work in chapter III on countermeasures constituted a valuable summary of State practice and struck a fair and appropriate balance between the interests of the injured State and the wrongdoing State. It was his delegation's view, however, that resort to dispute settlement procedures should not necessarily preclude countermeasures.

47. With regard to articles 51 to 53, on the consequences of an international crime, his delegation had serious concerns about including the concept of international crime in the draft articles. Leaving that issue aside, if the exceptions to the obligation to provide reparation in article 43 and article 45, paragraph 3, were eliminated, article 52 would also be unnecessary and should be deleted. Article 53, subparagraph (a), which obliged a State not to recognize as lawful the situation created by the crime, did not distinguish between explicit and implicit recognition. Subparagraphs (a) and (b) were both problematic in that they contained no reference to time-frames.

48. His delegation believed that it was both desirable and feasible for the Commission to complete its work on the topic within the quinquennium and felt that the eventual form the draft articles would take should be left open for the time being.

49. **Mr. González Sánchez** (Venezuela) said that his delegation was grateful to the Commission's Working Group for re-examining the draft articles on jurisdictional immunities of States and their property in the light of recent developments of State practice and legislation. However, the case law examined did not fully reflect the jurisprudence of national courts on the matter. His delegation was carefully considering the Working Group's recommendations on the concept of the State, state enterprises, contracts of employment and measures of constraint, and would present its ideas at the forthcoming meeting of the working group of the Sixth Committee on the topic. A truly effective draft convention which was acceptable to all States would make a great contribution to the codification and development of international law.

50. In dealing with the topic of State responsibility, the Commission, in its effort to improve the draft articles, should not stray too far from its original version. Any changes should serve to streamline and clarify the text without reducing its content and scope.

51. The distinction between obligations of conduct and obligations of result set forth in draft articles 20 and 21 was far from academic and had major implications for the secondary rules that would be developed to determine State responsibility. Thus while his delegation could accept drafting changes that might streamline the provisions, it strongly supported retaining that distinction.

52. His delegation was particularly interested in the issues raised in connection with chapter IV, on implication of a State in the internationally wrongful act of another State. The inclusion of the word "assistance" in article 27 was appropriate. The point at issue was not the joint conduct of two or more States, which might appropriately be placed under chapter II, but rather the specific problem of the possible implication of one State in the wrongful act of another State, which deserved separate treatment. In the proposed article 28, on the responsibility of a State for coercion of another State, it should be clarified that the term "coercion" was not limited to the use of armed force, but extended to any contact, including economic pressure, that left the coerced State with no option but to comply with the desires of the coercing State.

53. With regard to chapter V, on circumstances precluding wrongfulness, he stressed that the wording should embody a restrictive criterion in order to prevent States from using it as an excuse for not complying with their international

obligations. His delegation agreed with the Special Rapporteur that there was a valid distinction between "fortuitous event" and "*force majeure*" and therefore supported his proposed new wording for article 31, which deleted the reference to the former and provided a better definition of the latter. The Special Rapporteur's proposal to eliminate the subjective element implied in the phrase "to know that its conduct was not in conformity with that obligation", was also a sound one.

54. With respect to article 40 and the meaning of "injured State", his delegation believed it was appropriate to refer to a right infringed by the act of a State but not necessary to refer to the damage so caused. The infringement of a right need not cause damage, still less immediate damage; the wrongful act might cause potential damage. His delegation concurred that the list contained in paragraph 2 of draft article 40 was merely indicative and left open the possibility that other situations might apply, for instance, that a State might be injured by a unilateral act of another State, a topic taken up elsewhere by the Commission.

55. Article 40, paragraph 3, concerning a State injured by an international crime, should be retained and specific rules relating to the legal consequences of such acts should be included. Similarly, if the decision was made to retain article 19, one of the most controversial articles, then articles 51 to 53 must be retained also. The distinction between delicts and crimes — or to use a more acceptable term, exceptionally serious wrongful acts — was important if specific rules were to be established to govern the legal consequences of those acts.

56. His delegation fully supported the principle underlying article 41, since the obligation to cease wrongful conduct was surely the first necessity. Mention of cessation of wrongful conduct could appear either in a separate provision, as the Commission had proposed, or in the article on the consequences of an internationally wrongful act, as suggested by France in its written commentary.

57. **Mr. Keinan** (Israel) said that one of the most controversial aspects of Part Two of the draft articles on State responsibility (A/54/10, chap. V) was the definition of an injured State. Article 40 set out a series of situations in which States could be considered to be injured, but his delegation was not convinced that the list made a useful contribution; in fact, some of the examples included in the list were actually problematic.

58. A case in point was paragraph 2(e), which addressed the situation of a State injured by a violation of a multilateral treaty: that provision appeared to attempt to usurp the role of the Vienna Convention on the Law of Treaties, particularly article 60 thereof. Violations of treaty provisions should, in the first instance, be governed by the provisions set out in the treaty itself. Failing that, the appropriate legal framework would be the law of treaties, not State responsibility.

59. A more fundamental problem arose in relation to violations of international law affecting States parties to a multilateral treaty, covered by article 40, paragraphs 2(e) and (f) and paragraph 3. In those provisions, the confusion between the concept of an "injured" and an "interested" State seemed likely to lead to absurd results, particularly in the light of the practical consequences of such a violation. As drafted, the articles provided that any one of States classified as "injured" had the right to claim reparation in the form of restitution, compensation and satisfaction. There was, however, no basis in international law or practice for enabling States to seek reparation in cases in which they could not show themselves to have been actually harmed. The concept of *erga omnes* obligations was, in fact, considerably more sophisticated than that suggested by the draft articles and did not imply that all States were affected by a violation in the same manner. In the case of interested States, as opposed to injured ones, the consequences of a grave violation would be limited to the right to call for the cessation of the unlawful conduct and for reparation to be made to the injured State. The approach of the draft articles on that issue clearly needed rethinking.

60. With regard to reparation, the basic principle established in article 42 was one of full reparation. Yet both article 42 and the subsequent articles suggested a certain erosion of that principle. Article 42, paragraph 3, which provided that "in no case shall reparation result in depriving the population of a State of its own means of subsistence", gave particular cause for concern. While under a strict interpretation none of the forms of reparation mentioned in the draft could actually justify the confiscation of means of production from a State, the provision, as a number of delegations had noted, created a convenient loophole for a wrongdoing State to abuse and seek to avoid the obligation to provide reparation, even where it had the means to do so.

61. With regard to compensation, his delegation continued to believe that interest, together with loss of profits, should not be optional but obligatory, in keeping with the principle of full reparation. His delegation also agreed that the requirement to pay compensation should be addressed in greater detail. As it stood, article 44 was unhelpfully brief, particularly when compared with the more detailed provisions contained in articles 45 (Satisfaction) and 46 (Assurances and guarantees of non-repetition). In amplifying the guidance contained in the article, useful reference could

be made to the various forms of compensation proposed by the Special Rapporteur in 1989.

62. The issue of countermeasures was arguably the most complex area of State responsibility, reflecting as it did the imperfections of the international legal regime. In dealing with that issue, the draft articles were required, on the one hand, to acknowledge that in practice, the risk of countermeasures might be the only effective deterrent to the commission of wrongful acts, while on the other hand not overly encouraging the use of such measures. The draft articles should, as far as possible, reflect the existing, albeit complex, rules of customary international law relating to countermeasures rather than attempt to recast or improve them. Accordingly, his delegation could not support the provision contained in article 48 requiring an injured State to negotiate prior to taking countermeasures, a requirement which, unlike the demand for cessation or reparation, had no basis in customary international law. Moreover, his delegation did not believe that it was practical to prohibit the taking of countermeasures either prior to or during negotiations, and it was concerned that such a provision might be abused by wrongdoing States, which would use the pretext of negotiations as a tactic for delaying countermeasures. The exception provided by the draft articles, namely, the provision in article 48 concerning interim measures of protection, was not sufficiently clear or unambiguous to resolve the difficulty.

63. His delegation shared the view of those States that had objected to the imbalance inherent in permitting only the wrongdoing State to take the case to arbitration while the injured State had no such right. Such an approach would inevitably lead to an increase in the use of countermeasures to provoke wrongdoing States into referring situations to arbitration.

64. Lastly, he wished to respond to the Commission's question concerning specific consequences attributed by the draft articles to "international crimes". His delegation had previously expressed its reservations concerning the usefulness of the concept of international crimes, reservations that were only strengthened in the light of the specific consequences proposed for the distinction. The provision in article 52 that enabled a State injured by a wrongful act designated as a crime to demand reparation even where that would subject the wrongdoing State to a burden out of all proportion to the benefit which the injured State would gain from compensation or that would seriously jeopardize the political independence or economic stability of the wrongdoing State had no basis in international law. While the consequences affecting all States as set out in article 53 were less problematic, his delegation was concerned that subparagraph (d) as drafted would require a State to cooperate with another State in any measure designed to eliminate the consequences of the crime, even if that State considered the measure to be ill-advised or unlikely to be effective.

65. **Ms. Todorova** (Bulgaria) said that her delegation could accept the simplification of chapter III of the draft articles on State responsibility proposed by the Special Rapporteur provided that it did not weaken the anticipated legal content and regulatory effect of the document. In its statement to the Sixth Committee at the previous session, her delegation had argued its views concerning the content of former draft article 19, which had been deleted from the current version of the draft articles. While appreciating the reasons for the deletion, her delegation wished to stress that the distinction between international delicts and international crimes was a substantive one. It was to be hoped that in its future work on the draft articles, the Commission would take that distinction into consideration, especially in relation to the regime of the consequences of responsibility. It should also take into account contemporary developments in international law, particularly the adoption and forthcoming entry into force of the Statute of the International Criminal Court.

66. She welcomed the Special Rapporteur's conclusion that article 26 *bis*, on the exhaustion of local remedies, should be retained. Her delegation noted with interest the Special Rapporteur's suggestions for reconceptualizing chapter IV (Implication of a State in the internationally wrongful act of another State) and reorganizing chapter V (Circumstances precluding wrongfulness). Her delegation was of the view that the draft articles offered a useful basis for discussion, but that they required further analysis as to the substance, taking into account the dynamic of contemporary international relations. If the evolution and nature of relations between the current subjects of international law were examined more carefully, the Commission's argument that article 29 *ter* (Self-defence) should be linked solely to Article 51 of the Charter of the United Nations would be deemed inadequate.

67. Her delegation had no difficulty with the recommendations contained in paragraph 29 of the Commission's report, and particularly in subparagraph (a). In addition, the delictual infringement of a right of an injured State should be more clearly defined in article 40.

68. Contemporary international law offered sufficient grounds for concluding that interest was an intrinsic part of compensation. That principle should therefore be spelled out more clearly in article 44. With regard to article 58,

paragraph 2, her delegation agreed with the Commission that the adoption of countermeasures should not be linked to the right to take the initiative in submitting a dispute to arbitration. Lastly, her delegation endorsed the Commission's suggestion that the draft articles should deal with the situation that arose when several States were involved in a breach of an international obligation or were injured by an internationally wrongful act.

69. Turning to the draft articles on nationality of natural persons in relation to the succession of States, she said that her delegation had no objections to the Commission's decision to recommend to the General Assembly that the draft articles should be adopted in the form of a declaration, in view of the complexity and length of the procedures relating to the elaboration, adoption and entry into force of an international treaty of a universal character.

70. **Mr. Rogachev** (Russian Federation) said that the much debated question of primary and secondary norms, their permissibility and their relevance to the draft articles on State responsibility should not have a decisive influence on consideration of the text; the Commission should be guided more by practical considerations. There were in fact a number of arguments against having the draft articles on State responsibility contain only secondary norms. For one thing, a growing number of international procedural norms was currently being formulated, so that the division of norms into "primary" and "secondary" was losing its practical significance.

71. His delegation attached great importance to ensuring that the draft articles fully reflected the emerging legal relations in that area. The absence of individual elements of that complex issue, regardless of the reason for their exclusion, would substantially undermine the value of the draft as a whole. His delegation hoped that the discussion on the so-called primary nature of the norms would not be one such reason.

72. His delegation noted with interest the Special Rapporteur's proposed reformulation of draft article 16. However, the proposed wording was not entirely satisfactory, as it encompassed at least two different questions previously dealt with in article 16 (Existence of a breach of an international obligation), article 17, paragraph 2 (Irrelevance of the origin of the international obligation breached), and article 19, paragraph 1. The new wording combined several provisions, each of which was so important that it deserved to be dealt with separately, and would also involve renumbering, which was best avoided. Article 17, paragraph 2, could have been retained with its meaning clarified.

73. His delegation did not agree with the possible interpretations of that paragraph set out by the Special Rapporteur in paragraph 92 of the report. Rather, the paragraph had been intended to enunciate one of the fundamental principles of State responsibility, namely, the irrelevance of the source of an international obligation to the responsibility that arose. His delegation therefore proposed that the paragraph should be reworded to read: "The international legal responsibility of a State which has committed an internationally wrongful act arises regardless of the origin of the international obligation breached by that State." That proposal was based, *inter alia*, on the views expressed in the Commission at its fifty-first session, as reflected in paragraph 103 of the report.

74. His delegation supported the Special Rapporteur's proposal to include a draft article enunciating the principle that, once the responsibility of a State was engaged, it did not lapse merely because the underlying obligation had terminated (A/54/10, para. 121). With regard to draft articles 24 and 25, his delegation believed that satisfactory results had already been achieved.

75. Chapter IV of the draft articles (Implication of a State in the internationally wrongful act of another State) was of fundamental importance. His delegation did not agree that the articles in that chapter would rarely be applied in practice, but in fact held a diametrically opposite view. From that standpoint, the question of which national legal system had exerted greater influence on the formulation of the provisions in that chapter, as referred to in paragraph 244 of the Commission's report, appeared to be of purely theoretical significance.

76. The question of the responsibility of States acting collectively was particularly important. The question of whether States acted collectively through an international organization or acted collectively without acting through separate legal persons was not crucial; States should not be able to evade responsibility for their wrongful acts even if they acted in the framework of international organizations. His delegation supported the view, set out in paragraph 260 of the report, that the situation addressed by the draft articles was such a topical one that the Commission could not defer a decision until it had dealt with the articles on the responsibility of international organizations. In that context, the requirement that an internationally wrongful act must be internationally wrongful not only for the committing State, but also for the "assisting" State, appeared superfluous.

77. His delegation supported draft article 29 *bis* proposed by the Special Rapporteur and believed that chapter V of the draft articles would be incomplete without it. He was

referring in that connection not only to cases involving the straightforward application of the *jus cogens* doctrine, but to the widespread situations arising from State practice based on Article 103 of the Charter of the United Nations, and involving not only the use of force but also compliance with economic sanctions imposed by the Security Council.

78. He agreed that Part Two of the draft articles should include detailed provisions on countermeasures with a view to the strict regulation of their use. However, his delegation's position on that question would be expressed when the Commission had drafted sufficiently detailed provisions.

*The meeting rose at 12.20 p.m.*